Date: August 27, 1997

Case No.: 96-INA-34

In the Matter of:

CLAY-PARK LABS., INC.,
Employer

On Behalf Of:

GINO C. BENAVIDES,
Alien

Appearance: Harlan E. Schackner, Esq.
For the Employer/Alien

Before: Huddleston, Neusner, and Rosenzweig
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 22, 1993, Clay-Park Labs., Inc. ("Employer") filed an application for labor certification to enable Gino C. Benavides ("Alien") to fill the position of Maintenance Mechanic (AF 17-18). The job duties for the position are:

> Set-up and operates variety of machine tools and fits and assembles parts to repair machine tools and maintain semi automatic and automatic tube machines, liquid filling machines, and automatic suppository machines, applying knowledge of mechanics, shop mathematics, metal properties, layout and machine procedures. Observes and listens to operating machines and equipment to diagnose malfunction and determine need or adjustment and repair. Studies schematics, machine parts and specifications to determine type of repairs needed. Measures, marks and scribes dimensions and reference points on metal stock surfaces, using measuring and marking devices such as calibrated ruler, micrometer, caliper and scriber. Dismantles machine and equipment, using hand tools, such as wrench and screwdriver to examine parts for defect and to remove defective part. Substitutes new part and repairs and reproduces part from various kinds of metal stock, using hand tools, such as scraper, file and drill and machine tools, such as lathe, milling machines, shaper, borer and grinder. Assembles and starts machine to verify correction of malfunction. Maintains and lubricates machine tools and equipment, using hand tools, ladder and lubricants. Welds broken structural parts, using arc and gas welding equipment. Repairs and replaces faulty wiring, switches and relays.

Furthermore, the requirements for the position are two years of experience in the job offered.

The CO issued a Notice of Findings on March 13, 1995 (AF 112-116), proposing to deny certification. First, the CO found that one applicant was rejected for other than lawful and job-related reasons in violation of § 656.21(b)(6). Second, the CO informed the Employer that, if it contended that experience with all of the machinery and in all aspects of the duties as described is necessary and required for the position, it must document that its requirements and duties arise from a business necessity. Finally, the CO found that the Alien gained his experience while working for the Employer. Thus, the Employer was instructed to document that the Alien was qualified when hired or that it is currently not feasible to train a U.S. worker.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Accordingly, the Employer was notified that it had until April 17, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated April 5, 1995 (AF 117-121), the Employer contended that the duties required for the job opportunity are precisely reflective of the actual duties performed by the Maintenance Machinist within its organization. The Employer emphasized the importance of these duties within its Company. Next, the Employer explained that the U.S. applicant in question "is not remotely qualified for the position." The Employer noted that the applicant was interviewed and it was determined that he did not possess the requisite experience. Finally, the Employer stated that the Alien was qualified prior to the time that he was hired. The Employer further argued that it is infeasible at this time to train a U.S. worker.

The CO issued the Final Determination on April 18, 1995 (AF 5-6), denying certification because the Employer did not establish that it did not train the Alien. Furthermore, the Employer failed to respond to two of the requests for documentation.

On May 4, 1995, the Employer requested reconsideration of the denial of labor certification (AF 135-137). The CO denied reconsideration on July 5, 1995 (AF 138). On July 25, 1995, the Employer requested review of the denial of labor certification (AF 139-143), and on September 28, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(5) requires an employer to document either: (1) that the requirements it specifies for a job opportunity are its actual minimum requirements and the employer has not hired workers with less training or experience for jobs similar to the one offered; or, (2) that it is not feasible to hire workers with less training or experience than that required by the job offer. Thus, an employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991). The purpose of this section is to prevent employers from requiring more stringent qualifications of a U.S. worker than it requires of the alien. The employer may not treat the alien more favorably than it would a U.S. worker. *ERF, Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

In this case, the CO, in accordance with § 656.21(b)(5), instructed the Employer to document that its requirements for the job opportunity, as described, represent the Employer's actual minimum requirements for the job opportunity, and that the Employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity, or that it is not feasible to hire workers with less training or experience than that required by the Employer's job offer (AF 113). Furthermore, the CO noted that the Alien had no experience in the job offered prior to his employment with the Employer. As such, the CO concluded that the Employer trained the Alien for the job opportunity and informed the Employer that it must fully document why it is not feasible to train someone else. Specifically, the Employer was instructed to document the following:

a. How many Maintenance Machinists were employed at the time the Alien was trained;

b. How many Maintenance Machinists are now employed (besides the Alien);

c. Change in total work force and annual volume of business from the time the Alien was hired and trained until present; and,

d. Why a company that has expanded considerably since the Alien was trained has not proportionately developed the ability to train now, as is customary with growth and development.

In the alternative, the CO informed the Employer that it could clearly show that the Alien, at the time of hire, had the qualifications which the Employer is now requiring or reduce the experience requirement to zero and document willingness to train a U.S. worker.

In its rebuttal submission, the Employer stated that the Alien was not trained for the job opportunity (AF 117). The Employer explained that, "the fact that Mr. Benavides [the Alien] was originally trained as a Maintenance Mechanic some 6 to 8 years ago does not negate the fact that he did work as a fully trained Maintenance Mechanic for a period of two years during which he acquired experience (not training) which is requisite to this job opportunity." (Emphasis in original.)

In addition, the Employer also stated that it cannot train another for the position of Maintenance Mechanic (AF 117). Responding to the CO's inquiries listed above, the Employer asserted the following:

a. At the time Mr. Benavides [the Alien] worked for us as a 'Maintenance Mechanic-Trainee' we had no one working as a fully trained Maintenance Mechanic.

b. None. I cannot find anyone who is qualified for the job position. We are currently using outside contractor services which are extremely expensive.

c. No one trained Mr. Benavides for this job opportunity. Mr. Benavides acquired the requisite experience for this job opportunity during his service as fully-trained Maintenance Mechanic in our organization.

d. Before originally hiring Mr. Benavides, our company never had the ability to train since we were never able to find one who was even qualified for that position. Mr. Benavides was hired in the 1980's when the economy was booming and we could afford to allocate personnel for training purposes. In today's tight economy and extremely competitive pharmaceutical industry, companies such as

> ours must tighten our belts and maximize the use of our labor force. At this time, therefore, we simply cannot afford to expend a productive full-time Maintenance Mechanic so that another may be trained for that position.

Therefore, it appears that the Employer is first arguing that the Alien was qualified for the job opportunity when he was hired by the Employer (AF 117). However, we find the Employer's response suspect for several reasons. First, the Employer contradicts himself in the rebuttal. At one point he states that, ". . . Mr. Benavides was not trained for this job opportunity . . .." Then, the Employer states, "Mr. Benavides was hired in the 1980's when the economy was booming and we could afford to allocate personnel for training purposes" thus indicating that the Alien was trained by the Employer. Second, the Employer did not provide any documentation to support its apparent contention that the Alien attained the requisite experience before he was hired. An employer's conclusory statement that the alien is qualified is an insufficient response where the CO required documentation as to the alien's qualifications. *Cal-Tech Construction Co.*, 91-INA-148 (May 4, 1992). Furthermore, although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Thus, the Employer has not met its burden of showing that the Alien was qualified for the job opportunity.

The second prong of § 656.21(b)(5) operates as a savings clause: if the employer cannot demonstrate that the job requirements are the actual minimum ones or that it has not hired workers with less training and experience, then it can attempt to demonstrate that it is not feasible to hire workers with less training or experience than that required by the job offer. An employer must sufficiently document a change in circumstances to demonstrate infeasibility. See *Rouge and Robelo Restaurant and Bar*, 88-INA-148 (Mar. 1, 1989) (*en banc*). The employer's burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants has been characterized as heavy. *58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991); *Fingers, Faces, and Toes*, 90-INA-56 (Feb. 8, 1991). An employer may attempt to prove the infeasibility of training by showing a change in economic circumstances. *Rogue and Robelo Restaurant and Bar*, 88-INA-148 (Mar. 1, 1989) (*en banc*).

As discussed above, the CO in this case asked the Employer to document specific information in order to show that it is not feasible to train a U.S. worker (AF 113). In response, the Employer stated that, at the time the Alien was hired, no one was working as Maintenance Machinist (AF 117). He further stated that currently no Maintenance Machinists are employed. Finally, the Employer explained that,

> Mr. Benavides was hired in the 1980's when the economy was booming and we could afford to allocate personnel for training purposes. In today's tight economy and extremely competitive pharmaceutical industry, companies such as ours must tighten our belts and maximize the use of our labor force. At this time, therefore, we simply cannot afford to expend a productive full-time Maintenance Mechanic so that another may be trained for that position.

The CO found this response to be insufficient as the Employer did not respond to (d) and (e) of the NOF (AF 122). We agree with the CO in that the Employer failed to document its change in total work force and annual volume of business from the time the Alien was hired and trained until the present (AF 113).[2] An employer's failure to produce relevant and reasonably obtainable information requested by the CO is ground for the denial of certification, especially when the employer does not justify its failure. *Vernon Taylor,* 89-INA-258 (Mar. 12, 1991); *SILO Corporation,* 90-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services,* 88-INA-40 (July 5, 1988). We find that the CO's requests were reasonable and we also note that the Employer offered no explanation in its rebuttal for its failure to answer the CO's questions.[3]

Notwithstanding the Employer's failure to include specifically requested information, we find that the Employer has failed to establish that it is infeasible to train a U.S. worker. A bare statement of infeasibility to train is inadequate to establish that an employer cannot now hire workers with less experience and provide training. *MMMATS, Inc.*, 87-INA-540 (Nov. 24, 1987) (*en banc*); *Coastal Printworks, Inc.*, 90-INA-289 (Oct. 29, 1991). Although we appreciate the Employer's concerns about training another individual, we find that the Employer's general, undocumented assertions are not sufficient to meet the heavy burden of showing that it would be infeasible to train another individual.

Accordingly, the Employer has not established that its requirements for the job opportunity, as described, represent the Employer's actual minimum requirements for the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the Employer's job offer. Therefore, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

[2] We note that the CO incorrectly stated that the Employer did not respond to (e) of the NOF (AF 122).

[3] In its Request for Reconsideration, the Employer stated that its failure to respond to question (d) was a clerical error (AF 137). We find that this is not an acceptable excuse. Employers must carefully review their rebuttals before submitting them. It is well-settled that evidence first submitted with the Request for Review will not be considered by the Board. *Capriccio's Restaurant,* 90-INA-480 (Jan. 7, 1992).

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.